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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/981,977	10/17/2001	Steve Dispensa	1574	1819

28004 7590 08/31/2010

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6391 SPRINT PARKWAY
KSOPHT0101-Z2100
OVERLAND PARK, KS 66251-2100

EXAMINER	
NANO, SARGON N	

ART UNIT	PAPER NUMBER
2457	

MAIL DATE	DELIVERY MODE
08/31/2010	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte STEVE DISPENSA, JASON M. SLODERBECK, and JAMES LANDON

Appeal 2009-007019
Application 09/981,977
Technology Center 2400

Before JOHN A. JEFFERY, STEPHEN C. SIU, and DEBRA K. STEPHENS, *Administrative Patent Judges*.

STEPHENS, *Administrative Patent Judge*.

DECISION ON APPEAL[1]

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[1] The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the "MAIL DATE" (paper delivery mode) or the "NOTIFICATION DATE" (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

Appellants appeal under 35 U.S.C. § 134(a) (2002) from a final rejection of claims 1, 4-21, 24-41 and 44-60. Claims 2, 3, 22, 23, 42 and 43 are canceled. We have jurisdiction under 35 U.S.C. § 6(b) (2008).

We REVERSE.

Introduction

According to Appellants, the invention is related to a probe device for testing a broadband wireless system. In response to an execution instruction, the probe device executes a plurality of tests which measure the performance of the broadband wireless communication system. (Abstract).

STATEMENT OF THE CASE

Exemplary Claim(s)

Claim 1 is an exemplary claim and is reproduced below:

1. A method of operating a probe device for testing a broadband wireless system, the method comprising:

receiving an instruction into the probe device through a wireless broadband router coupled with the broadband wireless system to execute a plurality of tests, wherein the probe device and the wireless broadband router are located on a customer premises;

executing the plurality of tests to measure performance of the broadband wireless system based on the instruction;

determining performance information from the plurality of tests; and

storing the performance information in a memory of the probe device.

Prior Art

Lipa	6,061,722	May 9, 2000
Fijolek	6.553,568 B1	Apr. 22, 2003 (filed Sept. 29, 1999)
Vogel	6,807,515 B2	Oct. 19, 2004 (filed Sept. 14, 2001)
Giroir	6,829,642 B1	Dec. 7, 2004 (filed June 27, 2000)

Rejections

Claims 1, 4-8, 15-18, 21, 24-28, 35-38, 41, 44-48 and 55-58 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 6,829,642 to Giroir and U.S. Patent No. 6,807,515 to Vogel.

Claims 9-12, 19, 20, 29-32, 39, 40, 49-52, 59 and 60 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Giroir, Vogel, and U.S. Patent No. 6,061,722 to Lipa.

Claims 13, 14, 33, 34, 53 and 54 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Giroir, Vogel and U.S. Patent No. 6,553,568 to Fijolek.

GROUPING OF CLAIMS

(1) Appellants argue claims 1, 4, 5, 15-17, 21, 24, 25, 35-37, 41, 44, 45, and 55-57 as a group on the basis of claim 1 (App. Br. 4). We select independent claim 1 as the representative claim. Appellants argue claims 6-8, 26-28 and 46-48 as a group and claims 18, 38 and 58 as a group (*id.*).

Claims 6- 8, 18, 26-28, 38, 46-48, and 58 depend from independent claims 1, 21, and 41; therefore, we group claims 6- 8, 18, 26-28, 38, 46-48, and 58 with group 1. Accordingly, we treat claims 4-8, 15-18, 21, 24-28, 35-38, 41, 44-48, and 55-58 as standing or falling with representative claim 1.

(2) Appellants argue claims 9-11, 19, 20, 29-31, 39, 40, 49-51, 59, and 60 as a group and claims 12, 32 and 52 as a group (*id.*). We select claim 9 as the representative claim. We will, therefore, treat claims 9-12, 19, 20, 29-32, 39, 40, 49-52, 59, and 60 as standing or falling with representative claim 9.

(3) Appellants argue claims 13, 14, 33, 34, 53, and 54 as a group (*id.*). We select claim 13 as the representative claim. We will, therefore, treat claims 14, 33, 34, 53, and 54 as standing or falling with representative claim 13.

See 37 C.F.R. § 41.37(c)(1)(vii).

ISSUE 1

35 U.S.C. § 103: claims 1, 4, 5, 15-17, 21, 24, 25, 35-37, 41, 44, 45, and 55-57

Appellants argue their invention is obvious over Giroir and Vogel since neither reference teaches or suggests a probe device and a wireless broadband router located on a customer's premises, or receiving an instruction into the probe device through the wireless broadband router. Specifically, Appellants dispute that Giroir teaches or suggests the probe device and the wireless broadband router being located on a customer

premises (App. Br. 5-6) as the TN3270 client is not the probe client discussed in Giroir, and thus cannot teach or suggest the probe device (Reply 2). Appellants contend Giroir teaches the probes execute within probe clients of a distributed measurement system located close to the group of end users running the client program; however, Giroir does not teach or suggest, and teaches away from, placing the probe clients 1010 on a customer premises (App. Br. 6-7). Moreover, Appellants contend the Appellants assert the distributed measurement systems 1009 are shown *within* the IP network 1005 and not the user clients 1001-1004 (App. Br. 7). Thus, Appellants argue Girior does not teach or suggest a probe device located on a customer premises, as recited in claims 1, 21 and 41 (App. Br. 7).

Appellants additionally argue Vogel does not cure the deficiencies of Giroir and further, neither Giroir does nor Vogel teach or suggest wireless broadband routers located on a customer premises (App. Br. 7 and 8). Specifically, Appellants contend that Vogel does not teach or suggest any wireless broadband routers or receiving an instruction into a probe device through any type of wireless device (App. Br. 8).

Moreover, Appellants argue that "even if Giroir and Vogel provided the elements described in the advisory action, no motivation exists to combine them since Giroir does not teach or suggest in testing a broadband wireless system and Vogel monitors its wireless network in an entirely different fashion (Reply Br. 8).

The Examiner finds the measurement probes may be software and thus, Giroir teaches measurement probes being utilized to test the system (Ans. 9). The Examiner further finds Giroir teaches a wireless software

Cisco router that handles broadband traffic (*id.*). The Examiner then finds the TN3270 Client software runs within the customer's workstation and the TN3270 Server software is usually placed in front of or directly within the customer's data center mainframes or within the customer's branch offices (*id.*). In addition, the Examiner finds Firoir discloses having each device on the same premises is desirable for accuracy purposes (*id.*).

Issue 1: Has the Examiner erred in finding Giroir teaches or suggests "receiving an instruction into the probe device through a wireless broadband router . . . wherein the probe device and the wireless broadband router are located on a customer premises" as recited in claim 1.

PRINCIPLES OF LAW

In rejecting claims under 35 U.S.C. § 103, the Examiner bears the initial burden of presenting a prima facie case of obviousness. *See In re Rijckaert*, 9 F.3d 1531, 1532 (Fed. Cir. 1993).

It is well-established that a conclusion that the claimed subject matter is prima facie obvious must be supported by evidence, as shown by some objective teaching in the prior art or by knowledge generally available to one of ordinary skill in the art that would have led that individual to combine the relevant teachings of the references to arrive at the claimed invention. *See In re Fine*, 837 F.2d 1071, 1074 (Fed. Cir. 1988).

"It is impermissible to use the claimed invention as an instruction manual or 'template' to piece together the teachings of the prior art so that

the claimed invention is rendered obvious . . . ." *See In re Fritch*, 972 F.2d 1260, 1266 (Fed. Cir. 1992).

ANALYSIS

We find the Examiner has failed to establish a prima facie case of obviousness. Specifically, in the Answer, the Examiner introduces Giroir as teaching a wireless software router that handles broadband traffic (Ans. 9). However, the Examiner fails to identify how the disclosure of a "Network Utility from IBM or CISCO router's offerings" teaches or suggest a wireless software router that handles broadband traffic.

Additionally, from the Answer, it is not clear if the Examiner is now finding that the TN3270 Client software is the probe device, whereas previously the Examiner seemed to indicate the "Availability and Response Time Probes" were the probe devices (*See* Final Rej. 3 and Ans. 4 and 9). Although the Examiner identifies teachings in Giroir that the Distributed Measurement System must be "physically located as close as possible to the group of end users," the Examiner has not provided any persuasive arguments or evidence that the combination of Giroir and Vogel teach or suggest that both the wireless router and the probe device be at the same location, namely on a customer premises as claimed (*See* Ans. 3-4 and 9).

The gaps in the findings would require us to speculate as to what the Examiner meant. We decline to engage in such speculation. Therefore, after considering the totality of the arguments and evidence before us, we conclude the Examiner failed to show the combination of Vogel and Giroir teach or suggest the invention as recited in independent claims 1, 21, and 41.

Since claims 4-8, 15-18, 24-28, 35-38, 44-48, and 55-58 depend from claims 1, 21, and 41, we reverse these claims for similar reasons as we reversed claims 1, 21, and 41.

ISSUE 2

35 U.S.C. § 103(a): claims 9-12, 19, 20, 29-32, 39, 40, 49-52, 59, and 60

Claims 9-12, 19, 20, 29-32, 39, 40, 49-52, 59, and 60 depend from claims 1, 21, and 41 which the Examiner has not shown to be obvious over Vogel and Giroir. Further, the Examiner has not shown that Lipa cures the deficiencies of these references. Accordingly, the Examiner has not shown Vogel, Gioir, and Lipa render the invention as recited in claims 9-12, 19, 20, 29-32, 39, 40, 49-52, 59, and 60 obvious.

ISSUE 3

35 U.S.C. § 103(a): claims 13, 14, 33, 34, 53 and 54

Claims 13 and 14 depend from independent claim 1, claims 33 and 34 depend from independent claim 21, and claims 53 and 54 depend from independent claim 41. The Examiner has not shown that Vogel and Grioir render claims 1, 21, and 41 obvious. Further, the Examiner has not shown that Fijolek cures the deficiencies of Vogel and Grior. Accordingly, the Examiner has not shown Vogel, Giroir, and Fijolek render the invention as recited in claims 13, 14, 33, 34, 53, and 54 obvious.

DECISION

The Examiner's rejection of claims 1, 4-8, 15-18, 21, 24-28, 35-38, 41, 44-48 and 55-58 under 35 U.S.C. § 103(a) as being obvious over Giroir and Vogel is reversed.

The Examiner's rejection of claims 9-12, 19, 20, 29-32, 39, 40, 49-52, 59 and 60 under 35 U.S.C. § 103(a) as being obvious over Giroir, Vogel, and Lipa is reversed.

The Examiner's rejection of claims 13, 14, 33, 34, 53 and 54 under 35 U.S.C. § 103(a) as being obvious over Giroir, Vogel, and Fijolek is reversed.

REVERSED

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